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Panel Discussion

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PANEL DISCUSSION*

Professor Swan: I think we are ready to begin this afternoon's session. Our procedure is going to be kept fairly informal. The way I think we should start is to allow individual panel members to make any comments they choose based upon this morning's presentations. If that develops into some interesting things, and if the discussion becomes focused, we will keep with it. Otherwise, the chair will exercise the prerogative of moving to the floor for questions. So, with that we will start. Mr. Giuliani, would you like to begin?

Mr. Giuliani: Yes. The question that came up in my mind, while I was listening to other presentations, was this whole notion that the process of determining asylum was not, or should not be, political—although I'm not sure that I know what is meant by "political." Of course it would have to be political. You have to determine whether someone has a "well-founded fear of persecution"¹ in a foreign country. That means that to decide responsibly, you must assess the conditions within that country. You should presume in favor of the institution of your government empowered with the responsibility of carrying out that mission, namely the State Department.

The impression that I was left with, that somehow the State Department should have no role in this or should have a much smaller role in this, cannot go unchallenged. The State Department is, institutionally, our eyes and ears in the rest of the world. You must put heavy emphasis on what it reports about conditions within a foreign country.

The question of how you would handle a communist government or, let's say, an enemy government, as opposed to one with which we have diplomatic relations, is also important. Of course, all of these cases have to be decided on a case-by-case basis. Nev-

* The panelists were Professor Barry R. Chiswick, Rudolph W. Giuliani, James J. Orlow, Michael H. Posner, and Professor John A. Scanlan. The moderator was Professor Alan C. Swan.

The tape recording of the discussion was transcribed verbatim; however, to facilitate reader comprehension, members of the *University of Miami Law Review* edited the transcript. The changes made were stylistic and grammatical in nature, and the staff conscientiously attempted to retain the flavor of the discussion as it occurred.

1. Immigration and Nationality Act of 1952 ("INA") § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. V 1981).

ertheless, it is very difficult to determine whether people will be persecuted if you are returning them to a country with which you have no relations or to an enemy government with which you cannot work out agreements, so that you cannot trace people who are returned.

On the other hand, we concluded an agreement with the Haitian government before interdiction went into effect. The government of Haiti gave us the right to follow what happened to people who were to be returned. That in fact has occurred with regard to people who have been interdicted. That is also possible to do with a government, although it may be authoritarian or totalitarian, if we have diplomatic relations with it. Therefore, we have State Department officers who can do things like trace people when they return. You can't conclude that type of agreement with a government if you don't have diplomatic relations with it.

This is not, by any means, the whole answer to whether someone is granted asylum. But it certainly is a factor that has to weigh heavily in deciding whether to grant asylum in a particular case. Assume that the facts do not suggest that a person fears persecution upon return, and, at the same time, that you have the ability to follow that person when he returns, and that in fact that government agrees to permit you to follow people upon return. This scenario makes a pretty powerful case for no real basis for political asylum. When you look at it in the context of a government with which we do not have diplomatic relations, then it becomes much more difficult, and it's a much blinder decision whether to return someone to that country.

We have granted asylum to people from Haiti. We have denied asylum to people from governments with which we do not have diplomatic relationships, because it has to be decided on a case-by-case basis. You can't oversimplify. Nonetheless, these are factors that must be considered.

If what is meant by "political decision" is partisan politics, I agree, obviously, that it should play no role. But if what is meant by politics is politics in the broadest sense, assessing what the situation is within another country, assessing what our own relations with that nation are, then it would be unrealistic, and basically silly, to disregard all of these facts.

Professor Scanlan: I think there are probably a number of us here who would have something to say about that. I don't think we would have to worry too much about keeping the conversation going. [Laughter] So, I'll just take my small piece and then let

somebody else pick up with it.

A distinction that perhaps wasn't made as clearly by anybody this morning as it might have been, is the one between the Immigration and Nationality Act section 207,² refugee allocation process, and sections 208³ and 243(h)⁴ combined; and I know that Jim Orlow has some questions about that combination. Nevertheless, I would regard section 208 as the political asylum provision of the Refugee Act of 1980,⁵ which also includes the withholding and deportation provisions. When we're talking about section 207—where the numbers came up this morning—you're talking about deciding to bring, usually from a third country (intermediate country of first asylum), *x* number of people who are by definition (since that is what section 207 requires) refugees, who are defined as such under section 101(a)(42).⁶

Being a refugee in Ethiopia, or in Somalia, or in the Sudan, or in Costa Rica, or anyplace else where refugees find themselves, does not under American law give anybody a right of entry into the United States. All that the law provides is membership in a particular category of people who are potential entrants if, in the President's consideration of the national interest, he decides that we ought to take *x* number of people from one of these particular countries. So if we have an allocation of 100,000 people from Indo-China, 21,000 from Russia, or 9,000 people from Eastern Europe, then of course we're dealing with very broadly defined political considerations. There is no question about that. The President is determining what is in the national interest. He is choosing among a large group of people who might want to come to the United States, and there are a lot of political factors that enter into that sort of decisionmaking. I am concerned about the way in which we have made those political decisions, but I would certainly not want to suggest that we conceivably could get away from the political element.

2. INA § 207, 8 U.S.C. § 1157 (Supp. V. 1981) (added by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103).

3. INA § 208, 8 U.S.C. § 1158 (Supp. V. 1981) (added by the Refugee Act of 1980), Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105).

4. INA § 243(h), 8 U.S.C. § 1253(h) (Supp. V 1981) (as amended by the Refugee Act of 1980), Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107).

5. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.) (amending the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163).

6. INA § 101(a)(42), 8 U.S.C. § 1011(a)(42) (Supp. V 1981) (as amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 103).

Contrast that, however, with what happens under INA sections 208 and 243(h). Under section 243(h), there is a mandatory, not discretionary, requirement that we shall not return individuals to countries where there is genuine reason to believe that they will be persecuted for any of the definitional reasons if they are in fact returned. When we're talking about that sort of mandatory requirement, we are talking about the administrative agencies that are empowered to make those determinations and about giving the individuals concerned some minimal level of due process. When we're talking about giving people due process, we're not talking about whether under some conceivable system the State Department could trace everybody who has been sent back to Haiti, or El Salvador, or Guatemala, or what have you, or act as a sort of United States representative abroad, or make sure that their rights were not being trampled on. Instead, we're talking about individuals' well-founded fear of persecution for any of a number of stated reasons. That well-founded fear of persecution, according to the international standard, the 1951 Convention,⁷ and the 1967 Protocol⁸ is initially a subjective concern. But it is one that the adjudicator is going to evaluate by also taking objective facts into account. In other words, first we ask, "Is this person telling the truth when he says, 'I'm scared to death that if I return to Haiti, I'm going to be shot or imprisoned'?" If the person is not that frightened, there's no reason at all to withhold deportation. If that person *is* that frightened, then under the statute we can't send that person back.

How do we know? One way is by making guesses, if you like, but well-informed guesses about whether the story that we are hearing jibes with what we can ascertain about the conditions in the country to which a person might be sent. The question then becomes, "Is the State Department—which is going to want to maintain certain types of relations with particular countries—going to be willing to go to the wall and say, 'Gee, it is likely that Iran is going to shoot all of the Bahais'?"⁹ I think the answer clearly is that the State Department is not institutionally qualified

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The United States is not a party to this convention.

8. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

9. Professor Scanlan refers to the adherents of Bahaism, a religious sect founded in Iran in the nineteenth century. The regime of Ayatollah Khomeini has intensified the discrimination against the Bahai into actual persecution.

to make that sort of judgment. So I think that at least in the section 208 and 243(h) areas, that is the argument about getting the State Department out.

Mr. Orlow: Two comments: First, I guess I'm now going to return to my regular daily work as a guy who runs around with a little brown book and quotes the statute. I wish that section 243(h) were as mandatory as you say it is. I don't think the statute says that today, although it once did. There is today a lot of fact-finding discretion within the Immigration Service to decide section 243(h) matters—a discretion that previously didn't exist.

What my experience helps me focus on is the search for legitimacy in decisionmaking and the attempt to legalize it, or proceduralize it, or "statutalize" it, or whatever and, therefore, to somehow make the decision process easier for the decisionmakers. If I were a judge—and I don't think that I could ever be a judge—I would want to know that I'm helping execute a system that has a greater moral claim than my own judgments and that I don't have to feel morally responsible for a mistake in judgment that is systematic. If I'm doing what the system tells me, then, automatically, I'm doing justice, even if the system happens to have told me to do a thing that I don't particularly like. I've had judges do that. They have said, "Look, don't complain to me, this is the law, complain to the Congress; all I'm doing is what they told me to do." Now that's an easier judgment than one made on political grounds.

If I make a political judgment, then in many ways I am morally accountable for each decision, and it's harder. By making the judgment "legitimate, legal, in conformity with due process"—whatever that system is—we can escape the discomfort of measuring another human being's future life, which is something I personally would find very difficult to do. I don't want to do that, and I don't imagine other people are comfortable with that role either. If we legitimate the system, we're not acting in a political manner; rather, we're administering a fair, legal, orderly, proper, due process system. But, when you try to put what is political in the broadest sense into that system, you skew it, and you can't expect the system to function comfortably. That doesn't change the nature of the process. It is a political decision. The problem is trying to accommodate immigration policy in the broader sense, as well as the asylum policy and refugees—because asylum and refugees are really a smaller part of a larger picture, although in South Florida it seems to be a dominant theme—trying to accommodate these kinds of policy decisions in the broader political sense, and

even in the context of partisan political decisions. Let's say the people who elect me to Congress are from an area where cheap labor is needed, and I want to get it for them because that's what they sent me there to do. There's nothing wrong with that in the democratic process. But in trying to put those kinds of decisions into an administrative system, where people are supposed to be more or less equal, you're skewing the system. I suggest that it's because the deciders want to have the sense of security (personally, morally, politically, whatever) that they're doing the right, fair, and just thing, and not merely making ad hoc decisions with which they are uncomfortable and which they will ignore after the fact.

My second comment is that when a Haitian or anyone else making an asylum claim tells me truthfully and honestly that he believes, "I'm gonna get hurt if I go back"—he must also prove that that *will* happen. His honest, subjective fears are not the legal predicate for a claim. It's enough to justify feeling sorry for him, perhaps, but he's got to prove also that it's real.

There's a middle-ground position that the State Department once adopted. Apparently, it has a quasi-legitimate basis, although the basis may be less legitimate since the 1980 amendments.¹⁰ That is, you used to get letters back from the Immigration Service, based on a State Department recommendation, stating, "Now don't grant him asylum, give him an extension of long-term voluntary departure and all the remedies that go with it. Don't grant him de jure asylum, grant him de facto asylum." That's a legal status. The problem with this approach today is that if he is granted de jure asylum, a year later it could ripen into permanent residence. De facto asylum may or may not ripen into anything. But if he's really a refugee, then what he's entitled to under international law is sanctuary, and de facto asylum gives that to him. Now that may be a way of reconciling a State Department need to have a flexible foreign policy with a humane approach to dealing with individual human beings.

Mr. Posner: I just want to comment briefly on Mr. Giuliani's discussion of what we mean by political considerations in the system. First, I think it's true, as Professor Scanlan pointed out, that the Administration and the Congress have a perfect right to make whatever decisions they want with regard to the regular admission process under section 207. I may disagree with their decision—and

10. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

I do disagree with the way the numbers have been allocated the last three years—but that's my right. It's quite another thing, however, when we start talking about the domestic asylum situation. When we say political, what we mean is politically biased.

Nobody would ever suggest that the State Department doesn't have useful information about particular countries. They certainly do. But it's biased information, and it covers a number of objectives, one of which is to get facts in front of an immigration judge. The State Department exists to carry out the foreign policy of the United States. That foreign policy may or may not be consistent with making a particular decision in an individual case of an asylum seeker.

There is a practice in the State Department that I like to call "clientism." It tends to take place with whomever gets appointed to these positions. When somebody becomes a desk officer or ambassador to country X, they tend to take on their problems with a very defensive tone. I can think of a dozen instances in the past several years—where we've gone in with cases from Pakistan, Chile, the Philippines and Argentina—where the desk officers have actually said to me, "Your client probably has a good claim for asylum. Nevertheless, I have another objective. That is to say, I don't want to embarrass the government of Argentina or the government of the Philippines by granting this prominent dissident asylum in the United States. So I'm going to look for a way to avoid it." Now, that to me is political bias, and it's unacceptable. I think it is reflected in the statistics. Last year, two people from El Salvador were granted political asylum in the United States, and neither you nor anybody else in this government is going to convince me that, today, there aren't at least three people from El Salvador roaming around the United States who have a legitimate claim for asylum. The statistics just don't make sense. The numbers for Haitians were five last year and two in 1980. As long as those statistics stay the way they are, I'm going to keep believing that the system is politically biased.

Second, I think that our capacity to monitor a given situation can be a factor in evaluating claims for asylum. But I think it's not really what we're looking for. We're looking at an objective standard—whether somebody has a well-founded fear of persecution. The fact that the government of Haiti will make a promise to let American embassy people poke around in their country to look for returnees, is to me, not a very satisfying promise. I don't think our embassy has the capacity or the personnel to monitor the wherea-

bouts of thousands of people whom we intend to send back. I don't think the government of Haiti is sincere in making that promise. I certainly don't think that in a country like Guatemala or El Salvador, where violence is pervasive, our embassy people would have the stupidity to run around in areas not controlled by the government—where there's fighting going on—to try to make those sorts of evaluations. It is true that to the extent the United States has some influence over those countries, we may have some minor impact in preventing persecution in some cases. That's as far as I think we can take that point. Other than that, I think we must look to objective standards. We are nowhere near that now, and until we get there, the claims of political bias are going to continue.

Professor Chiswick: It seems to me that whenever you make decisions regarding refugee status, you are making political decisions, and we should recognize that they are political decisions. The question that has to be asked is how many State Departments should we have—one or two? Presumably, we want to have one State Department and one foreign policy—although, apparently, many administrations have had six or seven foreign policies running simultaneously. But that is often not to our advantage. Adding an extra element, having a party other than the State Department making foreign policy decisions and deciding whether a person has a well-founded fear of political persecution, makes foreign policy more complex and much more difficult. I would be much more sympathetic to the view of other agencies making these decisions, if the United States were the only other place in the world. Suppose we are talking about a world with only two countries, the United States and X. We want to have good relations with X, so the State Department doesn't want to say that X is repressive. What do you do when people from X show up on your shores? I think it's a much more difficult problem to handle when the United States is the only other place in the world. But we're not the only other place in the world, and we should not feel that if we don't take in these individuals, they necessarily are being condemned to return to where they came from and to suffer all sorts of dire consequences.

Professor Scanlan: Two points: One state department or two or three or four or however many we're interested in having—the State Department makes a foreign policy for particular reasons. The Refugee Act—at least the sections I have alluded to—protects the safety of individuals. The State Department does not work in a vacuum. Other countries, in determining who is enti-

tled to political asylum, have had absolutely no difficulty creating independent bodies to make that determination. In fact, I've heard that these countries take advantage of the fact that their diplomatic service can disclaim the craziness of the body that granted asylum, saying, "Gee, we're not responsible for that. We know that we keep out bad guys, but it was the immigration board that did it."—That is a nice system. It's even nicer if the UNHCR [United Nations High Commissioner for Refugees] is involved, because then we can blame it on the United Nations, which is a very popular game in the United States.

Mr. Posner: I just have one footnote to Professor Chiswick's comment. One of the things that we're talking about here is people who are outside the United States. For people who have already arrived illegally, however, the question is, should we send them back? A third option is to send them to some third place, and I'm not rejecting that idea. In other words, the requirement that I think we're trying to uphold, the legal requirement, is that they not be returned to persecution. If the United States determines that somebody is in fact a refugee or is entitled to asylum or to "non-refoulement," and if the United States wants to send them to Canada or France or wherever and those governments agree, you may do that without violating our obligations. But that's often not a possibility.

Professor Scanlan: I had a second point, which is the "infinite" capacity of other countries to take in people who are seeking political asylum. It's an interesting argument because we tend to use it the other way when we're talking about how generous we are and how we take in more refugees than everybody else in the world put together. When we don't want refugees, however, we say that the rest of the countries in the world are just waiting to take them in.

Nevertheless, I think that we can visualize this in somewhat more concrete terms. I have certain reservations about a long-term commitment to taking in Indo-Chinese at 100,000 a year or at 168,000 a year or at whatever figure we're talking about, simply because we are bringing people who are halfway around the world and who have not been part, until quite recently, of the larger cultural universe. If we're talking about a political process here, the Indo-Chinese are not very closely associated with that, and we are then talking about making hard decisions about how many refugees to admit. I suppose one could argue that it's a regional problem, rather than necessarily one that the United States alone

ought to be addressing. On the other hand, I think that frequently the refugees that we want to disavow are the refugees for which we have created a tradition of acceptance. It's very interesting that we are so terribly upset about the admission of Cubans to the United States right now, when we have had such a tremendous amount to do with creating that particular expectation and that particular problem—not beginning in 1959, but beginning when we took Cuba as a possession and established cultural ties between Cuba and the United States. It doesn't make a whole lot of sense to visualize that there are lots of countries in the world, other than ourselves, that would rather have the Cubans. That doesn't necessarily mean that we want them. But I don't think that we can take refuge in the abstraction that there are other countries out there that would be more likely to take them.

Professor Swan: May I make just a statement of criticism—this criticism, in fact, was running through most of this morning's session—in terms of the uses of section 207 authority of the President to admit large groups of people whom he wants to admit for any number of purposes. At least since World War II, presidents and people who conduct our foreign policy have found it necessary—perhaps for foreign policy reasons or domestic policy reasons—to bring these groups in. Yet there seems to be an undercurrent that there has been a high order of illegitimacy, irrationality, or unfairness, in the way that this authority has been exercised, and yet it is a policy, too. How would you address—in the context of any new legislation—standards, if you need standards, by which this process would be exercised, if indeed it has been perceived as not being used legitimately over the last thirty years?

Mr. Posner: One practical approach, of course, is to have Congress take an active role in the consultation. The way the process works now, the State and Justice Departments come up with a figure in the middle of September, and they say, "In two days this is what we're going to do." The Congress sits there and says "Okay!" Ideally, I think we ought to have a process in which the administration comes in six months ahead of time, holds open hearings on the various needs of various groups and creates a kind of advisory board. The board would, as one of its functions, evaluate the figures independently, consulting with both the State Department and the Justice Department and anybody else in the government who is interested. It also would look to what the United Nations and the voluntary agencies say as to what the worst needs of these groups are.

I think we must remember that when the Refugee Act was passed, we talked about a national entrance, and we talked about a humanitarian concern. Both factors have to go into decisionmaking. It doesn't mean that it's not a political decision; it doesn't mean we don't look to our national interest; it doesn't mean the President can't award a certain number of slots to Eastern Europeans if we want to make a point politically. But it does mean that we must be a little bit more humane and a little bit fairer about the process. Therefore, I think the more we open it up to discussion today, the more that's likely to happen.

Professor Chiswick: I'd like to return to the area that Mr. Orlow introduced earlier, about the Immigration Service and its budget and how it allocates its resources. He's more charitable than I would be. It is not just a question of an Immigration Service being starved for resources—a meager budget—but an Immigration Service that has been very badly administered. The employees within the Immigration Service may be, and probably are, very hard-working, dedicated people. But there has been I think a lack of will and a lack of aggressive administration by the Service's high-level administrators. We're not talking about the current commissioner—he just arrived. You see it if you look at the way resources are allocated within the INS and at the INS's lack of aggressiveness in battling for resources with the Justice Department and the Office of Management and Budget. If you look at dollars devoted to enforcement, what you see is that there has been a relative shift in funds and emphasis to the border patrol. That's very good if your objective is to get a larger number of apprehensions per dollar, but that may be a disastrous policy if the objective is deterrence or reducing the number of illegal aliens in this country who have used the border as a revolving door.

We talk about a million apprehensions per year, but we don't know whether that figure means 100,000 people apprehended on the average ten times, or 500,000 people apprehended on the average twice, or 1,000,000 people apprehended on the average only once. That's a very basic kind of information, which would be extremely helpful to the planning of enforcement operations. But the Immigration Service has been starved for resources, in terms of its research effort, and in terms of its gathering of statistics. The annual reports are always at least two years out of date. Now, something that at least most government agencies can do timely is producing descriptive data.

The decline in real resources devoted to interior enforcement

has been a very serious problem, because the emphasis on the border may have no effect on deterrence. You arrest somebody, you throw him across the border—chalk one up for an apprehension. Three nights later when he comes across again, you will apprehend him again—chalk up a second apprehension. The third time, he sneaks through. When he is apprehended in the interior and sent back, he has incurred costs getting into the interior and getting established; to go through that process again is more costly for the alien than simply trying to run across the border again the next night.

Also, nobody talks about penalties for apprehended illegal aliens, other than the penalty that is used now, deportation. I guess I've never understood the strong interest in employer sanctions. I suspect that's a way of saying, "The federal government really doesn't want to handle this situation for a variety of reasons. Let's put the blame on employers." There has also been a drift over the last couple of decades, not just towards federal government intervention in many more activities, but also towards placing greater burdens on employers. Now, what will happen with employer sanctions is a kind of affirmative-action-type program, but the other way around: Employers will have to demonstrate affirmatively that they made efforts *not* to hire illegal aliens.

We did a survey of employers of apprehended illegal aliens,¹¹ and found that a large number of them thought that by employing illegal aliens they were violating the law. They weren't, but that was what they thought. They thought the law had no teeth, so they violated it as, pardon my saying it, most of us may be apt to do. For employer sanctions to have any impact, there will have to be definite regulations and some means by which employers can determine whether the person has a legal right to work in this country. I find it surprising that an administration committed to reducing paper work and regulations wants to enter into a process that will necessarily result in far more bureaucratic intervention into everyday lives. Of course, it simply may not intend to have the law enforced, in which case you get the law on the books and then don't worry about enforcing it, making either everybody happy or everybody unhappy.

Let me read some numbers about the Immigration Service.

11. B. CHISWICK & F. FULLAM, FEASIBILITY STUDY FOR A SURVEY OF THE EMPLOYERS OF UNDOCUMENTED ALIENS: PROJECT REPORT, EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T OF LABOR (available from National Technical Information Service, NTIS No. PB 80-208879).

The number of permanent positions in the Service increased by nearly sixty percent from 1960 to 1979, a twenty-year period. During the same period, the annual number of immigrants that had to be processed more than doubled. Nonimmigrant admissions of aliens, tourists, students, et cetera increased eightfold, and the number of illegal alien apprehensions increased fourteenfold. There has been a nice growth in productivity, measured by activities per employee, but it's not clear if it's had much of an effect on deterrence. For fiscal years 1977 to 1979, the Immigration Service operating budget increased eleven percent in real dollars (that's corrected for inflation). That's a big increase! Where did the money go? Real resources devoted to what's called "service to the public", "support operation" and "program direction" (that's mainly headquarters activities) increased forty-seven percent. Border patrol resources increased one percent, but the detention and deportation resources decreased in real terms four percent, and what I think is the biting arm of enforcement, interior enforcement resources, decreased fifteen percent.¹²

There are three issues involved: First, the level of resources that the Immigration Service has at its disposal; second, how those resources are allocated among its enforcement activities; and third, concerns about what employer sanctions mean. Are they really going to have a "bite," and in what way are they going to be enforced? These are things that we should think about.

Mr. Giuliani: Employer sanctions are probably the single most vital part of an overall effort to reduce the number of people who come into this country. You really have to see these things together. Obviously, no one of them alone can answer the problems. It's like the problem of drugs coming into the country. Everybody has their own pet notions about what should be emphasized and what will stop the problem. In fact, there is no one thing that will stop it. Pressure has to be placed on all of the points at which people or drugs come into this country. The border patrol increase is necessary to give us the ability to stop more people from coming over. This is not going to stop everyone from coming over, and it certainly will not, by itself, seal our borders. It will reduce by some amount, however, the numbers coming in.

The employer sanctions will reduce one of the motivations for coming to the United States. But even if it is illegal to employ illegal aliens, and if there are monetary fines and the possibility of

12. See 36 U. MIAMI L. REV. 893, 910 (1982).

going to prison, that still will not stop everyone from doing it. It will stop, however, a certain number from doing it. When you seriously enforce that law, which we would have every intention of doing—there is already a budget allocation for increased interior enforcement if and when Congress passes that legislation, you are going to reduce the numbers of people who are coming. You are not going to eliminate the problem; you are not going to wipe it out. But if you combine an increased border patrol with employer sanctions that reduce the motivation, you are going to cut down the numbers significantly. When you also consider that from at least one of the countries that is the source of a good deal of the illegal flow, there will be increased avenues for legal immigration, we will not, I hope, have the same situation ten years from now that we have now, a large underground society living among us. All of these measures together are designed to give us more control over immigration than we presently have, or at least more than we had a year ago. Employer sanctions are a very, very important part of a program to return control over our borders to us.

The legalization program is also important. If we are going to legalize the status of perhaps millions of people who are here illegally, and put them on the road to citizenship, there is a potential that the legalization program itself could be an additional incentive for illegal migration. So we better have in place more substantial enforcement and deterrent mechanisms than we have had in the past. We had none in the past, and we had a border that was easily crossed by virtually anyone with the slightest bit of ingenuity. We need to have in place measures that (1) control the situation as it existed before amnesty, and (2) are ready to deal with the problems that amnesty will cause once the existence of it becomes well-known throughout the world.

Mr. Orlow: This is a perfectly realistic place to return to Professor Chiswick's point. Right now, the Immigration Service has a very ambitious I.D. card program, because it is said the old I.D. cards were too easily forged and altered. Under the old program, an arriving immigrant received his card either upon arrival at the airport, or within a week or two thereafter (because they were made up locally), or when he adjusted his status. Now, it takes six months, and sometimes you can't get a card for two years. I don't know whether a sanctions program that assumes the viability of an I.D. program is valid, because there is no capability to staff it. Nor do I believe that an amnesty program that is going to put three to six million new cases into the system is valid without

the capability of staffing it. We have a situation in which those people who come to the Immigration Service say, "I think I'm illegal. I think I have a remedy. I think I can get straightened out." They can plan, in certain cities, on starting to stand on line at two or three in the morning and, maybe, be heard the second or third day, merely to get a blank form. They will be lucky if they get the right blank form, because the people giving them the forms haven't been trained. INS personnel have good intentions, but they haven't been trained.

The kind of budgetary decision that you're describing as essential for enforcement doesn't reflect the parallel side of what to do when someone wants to be honest and wants to come to you to straighten out his situation. I have stood in immigration offices in at least three cities and have seen investigators cringe on an afternoon when people came in to surrender. The investigators had been at work since six o'clock in the morning. They had just come back from a raid. They didn't want to see anybody else; they couldn't see anybody else; they didn't know what to do with the people. That's just "Alice in Wonderland." It seems to me that someone has to take hold—and I don't mean to belittle the Service. I don't think it's the fault of anybody who's there now; I think it's the history of things. I am not saying it is this administration. I'm not even saying it's the previous administration. It's a long history that goes way back.

Mr. Giuliani: That's a very valid point. For a long time, the Immigration and Naturalization Service was considered a less than top priority within the Department of Justice. So when budget decisions were made, the Immigration Service was the place where you cut your budget. Also, if you compare the position levels in the Immigration and Naturalization Service with those at almost any other comparable organization within the Justice Department, those at INS are undoubtedly much lower. The Attorney General is well aware of that, and our first complete budget would allocate a lot more money to upgrading the positions in INS.

The single most important mission of Alan Nelson, the new Commissioner of the INS, is to straighten out the management of the Service. There is a whole host of severe management and budget problems, and they are the product of ten to twelve years of inattention and of treating immigration as a secondary problem, while crime, antitrust, and civil rights captivated the attention of the Justice Department.

Mr. Orlow: If that's true, Rudy—and I think it's more than

eleven or twelve years, it may be closer to thirty, but in any event

.....

Mr. Giuliani: I'm too young to remember. [Laughter]

Mr. Orlow: I started young. [Laughter] Where is the capability supposed to be for any kind of planning that is longer-ranged than just the obvious burning management problems? Is that supposed to come out of your Legal Policy Office, or from another agency—or do we get university people together to do it?

Mr. Giuliani: No, that planning capability is supposed to be coming out of, in the first instance, the Immigration and Naturalization Service. That is pretty much the job of [INS Acting Deputy Commissioner] Doris Meissner.¹³ The Office of Legal Policy in the Justice Department has the same overview type relationship with the INS as it has, for example, with the FBI and the DEA.

Mr. Orlow: What about long-range substantive policy, as distinct from the procedures to execute?

Mr. Giuliani: Those same two organizations.

Mr. Orlow: That's a change from previous ways that the Immigration Service used to do business. Traditionally, they went up to the Hill, and when asked what they thought about a particular substantive piece of legislation, they by-and-large would comment only on the procedures and cost but not on whether it was good or bad.

Mr. Giuliani: Well, then it's a change.

Professor Chiswick: I don't know what has happened in the new administration, but up to the end of the previous administration, the policy, research and analysis unit in the Immigration Service was essentially "zilch." Are you saying that there has been a substantial upgrading of that unit?

Mr. Giuliani: There has been a significant upgrading.

Professor Chiswick: Well, that's a big improvement.

Mr. Giuliani: As I stated, INS planning is under the Acting Deputy Commissioner, and she has put together a staff, and I honestly can't tell you how large it is, but *she* is very effective. Noticeable improvements will take time, but I am confident they will occur.

Professor Chiswick: May I make two comments on something that you said? You said that after the sanctions are enacted, you are going to request more interior enforcement resources. I'm

13. Ms. Meissner now serves as Executive Associate Commissioner of the Immigration and Naturalization Service.

not sure why you have to wait until *after*; that could be done now.

The second comment has to do with incarceration. In none of the proposals that I've seen regarding illegal aliens, have I come across anything about the effect of incarcerating for a month apprehended illegal aliens. If they're coming up during a harvest season, an apprehension at the border would be more expensive because they would lose the month by being in some stockade in the Southwest, rather than trying to return the next night or the night after.

Mr. Giuliani: Thank you, Barry, you look like a good guy.

Professor Chiswick: You gave me five dollars to set it up.

[Laughter]

Mr. Giuliani: I don't think we should be incarcerating people for longer than we must. The situation with aliens from Mexico has been that when they are apprehended and found to have illegal status (and they are usually found in groups), they're taken to one of the detention centers in El Paso or San Diego, and then after a day or two, they voluntarily agree to go back. I don't think it offers an additional deterrent to hold them for a month or two. The cost of that to us would be prohibitive.

The other immigration reform elements, a larger border patrol, employer sanctions, an increase in interior enforcement, as well as legal channels for admission (such as the guest worker program) have all been very, very hotly contested and debated. You can select any one of the issues, and you can find a total difference of opinion between two people, and both may have very valid studies supporting their positions.

In terms of the guest worker program, many people say, "We should not have a guest worker program; it can't work. The bracero program¹⁴ didn't work; therefore, a guest worker program wouldn't work. They will take jobs from Americans." Of course, labor maintains this position very, very strongly. Then, on the other hand, you have people who say, "The illegals take jobs Americans will not perform. For instance, in the Southwest the unemployment problems aren't the same as they are in other places. We need these people; they're a vital part of our economy. It's going to con-

14. The bracero program was authorized by the Act of July 12, 1951, ch. 223, Pub. L. No. 82-78, 65 Stat. 119 (repealed 1964, Pub. L. No. 88-203, 77 Stat. 363 (1963)). The aim of the program was to regulate the admission of Mexican nationals into the United States for temporary agricultural employment, so as not to "adversely affect" the wages and working conditions of domestic agricultural workers. See generally Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effects*, 17 LAB. L.J. 739 (1966).

tinue whether you try to stop it or not. Therefore, you should try to find a way to regulate it." I could probably speculate, based on prejudices, bias and whatever, as to the right answer, but I don't really *know* the answer—I don't think any of us do, and part of the reason for that is that we have no statistical base from which to determine what illegal aliens do and don't do. We don't know who they are; we don't know what jobs they're holding. When we estimate how many of them there are, we hear some people say three million, while others say six million. We're talking blindly about a very serious problem.

The theory of the guest worker program, as an experimental or pilot program, is to see if we can bring in 50,000 workers, as well as increase the legal flow from Mexico by another 20,000. So actually it would mean 70,000 workers from Mexico. The program would be conducted in states that want those workers, and under a regulatory scheme that follows the workers and protects them against abuse. Assume that we can do this with fifty to seventy thousand workers, and that it doesn't turn into what the *bracero* program was (which was alleged to have resulted in harsh and inhumane treatment for the people who came), and that the workers don't displace—to the extent that we can determine the jobs they're taking and the unemployment statistics in those communities—Americans from jobs. Those assumptions will give us facts from which to rationally decide whether to have a larger guest worker program, in numbers that I believe Professor Scanlan was talking about before, numbers that would have an impact on the problem. The Governor of Texas says that 400,000 people per year come into Texas to work temporarily, and, therefore, a 50,000-person guest worker program will not work. Or maybe it would work next year or the year after. But if in fact it works at the fifty to seventy thousand-worker level in answering these two major questions, then three years from now it could be a larger guest worker program. But if it doesn't work at the fifty to seventy thousand level, and they are displacing Americans, or we can't control the program, then we can abandon the effort. I think it's a rational, fair way to try to give us facts rather than a lot of speculation and political debate about such an important issue. It's a very sensible way to proceed.

Mr. Orlow: Let me ask a question. Take the Mexican situation, both in terms of its proposed increase in numbers, plus its recaptured unused Canadian numbers (which is a way to get at even more numbers), and the guest worker program (which is, pre-

sumably, predominantly Mexican). Are we not going to generate what I would call a "turnpike effect," given the scale of Mexican population growth? That is to say, when you plan a turnpike to handle a certain volume of traffic, pretty soon, as soon as you start it, there is more traffic than was planned because it is easier to use the road. Is there any consideration that by trying to regulate illegal entry, we're in fact encouraging it?

Mr. Giuliani: If the estimates are even generally correct as to the numbers of people that come in over the southwest border to work in the United States temporarily, I can't see that we would be encouraging a process that isn't already pretty much out of hand. If we can impose order and regulation on it, then we can, for the good of all involved, avoid a lot of the terrible consequences of their being in this country illegally. Let's assume that the Governor of Texas and the people in the Southwest are correct, and that illegal migration does not have a major impact on Americans who want jobs. Further, assume that the studies are correct and that it really does benefit our economy to have these people come in. Then one option is to accept the status quo. A lot of people argue, "This is a free-market decision that is being made, and it is working itself out." But as a result of the fact that they are here illegally, there are an awful lot of social and legal consequences for us and for them, such as the lamentable existence of an underground society beyond the protections of the law. If we can impose some form of regulation, so that these people are identified, they will have a status and a right to be here. I think this will eliminate many of the problems that we presently have in that area of the country. And we are going to begin the process of reestablishing order in the way that people come into this country.

Earlier, someone suggested that the Haitians were being used as an example of maintaining order or of stopping the flow of undocumented people into the country because it is easy to do it with them. I think that that was a very unfortunate and inaccurate comment. In any given year, we detain many, many more Mexicans than we do Haitians. We detain them for shorter periods of time because they voluntarily elect to go home. If, in fact, we were going to attempt to demonstrate that we can control the flow of people into this country, we're going to do it with illegal migrants from Mexico. We're not going to do it with the Haitians, the Afghans, or whatever other groups come in, because they enter in much smaller numbers. The single most important area in which to regain control is along the southwest border. Those are the large numbers.

When we talk about three to six million people who are in this country illegally, a significant percentage are Mexican nationals. If you look at the President's proposals¹⁵ and the Simpson-Mazzoli bill,¹⁶ many of the proposed reforms are designed to deal with that problem—increased border patrol, employer sanctions, increased interior enforcement, and legal channels to permit temporary admissions so that we can identify them and give them a legal status in our society.

Audience Member: Mexican leaders have indicated that oil and gas exports to the United States will be linked to continued, relaxed enforcement of U.S. immigration policy towards Mexican aliens. Further, President Reagan has expressed his desire to enlist Mexico's aid in stemming the threat of communism in Central America. How would these foreign policy considerations affect any proposed caps on legal immigration, and how would they influence U.S. border enforcement policies?

Mr. Giuliani: There is no doubt that Mexico is a close ally and good friend of the United States. If you look at the package of policies, you will note a recognition of this, including plans to more than double the amount of legal immigration from Mexico. I think that's in our mutual interest. All of the proposals that would relate to Mexico are proposals that are mutually beneficial to the United States and to Mexico. However, the Mexican government is not, publicly at least, in favor of the guest worker program. One theory is that they feel it would amount to a recognition, maybe, of some inadequacies in the Mexican economy. They are not in favor of a guest worker program, whereas the Reagan administration is. So the proposal was not developed necessarily to curry favor with Mexico, but was developed to try to solve a problem in a way that would be mutually beneficial to the United States and to Mexico, and to direct the flow of people from Mexico through legal channels and away from the illegal ways in which they are coming in now.

Audience Member: Mr. Giuliani, a few moments ago you mentioned that the greatest detention problems actually were Mexicans who were apprehended in the Southwest and who voluntarily agreed to go back, and I take it you were making some com-

15. Proposed Omnibus Immigration Control Act, 97th Cong., 1st Sess., 127 CONG. REC. S11,992 (daily ed. Oct. 22, 1981).

16. Proposed Immigration Reform and Control Act of 1982, 97th Cong., 2d Sess., 128 CONG. REC. S10, 619 (daily ed. Aug. 17, 1982); H.R. 7357, 97th Cong., 2d Sess., 128 CONG. REC. H10, 320 (daily ed. Dec. 18, 1982).

parison between those individuals who are here for work and, for example, Haitian detainees. How can they be compared? The Mexican workers turn right around and come back again; the Haitians do not. Instead, the Haitians—many of them, I take it—are seeking asylum. Isn't the Mexican situation different from the Haitian situation in which you detain people who will not volunteer to go back because they can't just turn around through the revolving door?

Mr. Giuliani: I wasn't suggesting what you say I was suggesting. What I was saying was that the question whether we're going to regain control of our borders and assert control over the immigration process is going to be resolved on the southwest border, not with flows of people from Haiti, Afghanistan, or other places. The southwest border is the core of our illegal immigration problem. That was the point I was making. Even the question of detention, in terms of people who are detained, relates to many more Mexicans than to Haitians or any other group.

Now, to get to the rest of your question, you're dealing with two different claims and two different issues. Some Haitians did want to return voluntarily. Some alleged that they were coerced into doing that. The judge who had that case appointed a special master who interviewed them and determined that they were not coerced, and they were returned voluntarily. Those that do not want to return voluntarily will have an opportunity to litigate their claim for asylum. In the case of Mexicans, the numbers may change, and the proportion changes. There are some Mexicans who do litigate, but very few. Most decide to go back voluntarily and, I suspect, thinking, "Well, next year I can come back again."

Professor Chiswick: Not just next year, next week.

Mr. Giuliani: Usually it's near the end of the season.

Audience Member: We have given priority to enter the United States legally to people from nations like the Soviet Union or Cuba, as opposed to nations like Haiti. Doesn't our immigration policy say that this country places a high priority on rights such as the right to vote or freedom of religion, as opposed to things like the right to food and shelter?

Professor Scanlan: Yes.

Professor Swan: Yes. I think it's in the statutory standards, isn't it?

Mr. Orlow: No! It seems to me that what it says is that the

McCarran amendments in the Internal Security Act of 1950¹⁷ regulating subversives along with the Immigration and Nationality Act of 1952,¹⁸ have a built-in, anticommunist bias. If you're coming as a refugee from a communist country, you're going to get preference. But if you're coming as a refugee from a fascist country, well, we're a little more friendly with the fascists, so we don't worry too much about you.

Mr. Posner: I think that your question indicates that you're falling into what I would call the "diabolical dichotomy" of [United States Representative to the United Nations] Jeane Kirkpatrick [laughter]: the distinction between authoritarianism and totalitarianism and the notion that anybody who comes from an authoritarian country, like Guatemala, is automatically better off than somebody who comes from a totalitarian state, like Yugoslavia. I don't buy that. I think that there are political problems in both the dictatorships of the left and of the right; we have a standard for asylum that is an objective political standard of persecution. It is a strict standard. It does not say that we take people because they are poor. But it does say, "If somebody has a well-founded fear of persecution, then regardless of where they are coming from, you have to take them." I would suggest to you that there are as many people in Guatemala as there are in Hungary or Romania that fit into that standard.

Audience Member: I have a question that I'd like to address to Mr. Posner, in terms of the diabolical dichotomy of Jeane Kirkpatrick. I'm worried about the distinction that you seem to be embracing, which produces a kind of optimism on your part, that we can focus on an objective distinction between political and economic repression. In other words, there is an unfortunate assumption that poverty is like getting an illness; it's just bad luck. Isn't it false to say that someone who is suffering from poverty doesn't have just as much right to a claim of asylum as someone suffering from other sorts of cataclysms?

Mr. Posner: I don't agree with that. First, I guess I do accept that it is as desperate a situation to be poor or hungry as it is to be

17. Amendment of Immigration Act of 1918, § 1832, 81st Cong., 2d Sess., 96 CONG. REC. 12,058 (1950) (enacted as amended in the Internal Security Act of 1950, Pub. L. No. 81-831, §§ 22-30, 64 Stat. 987, 1006-18 (repealed 1952)). See generally Wasserman, *The Immigration and Nationality Act of 1952—Our New Alien and Sedition Law*, 27 TEMP. L.Q. 62, 72-77 (1953-54).

18. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

politically persecuted. The law, however, and the historical background that allows us to have what we call a category, a special category of refugees and asylum, doesn't make that point. It provides a limited definition. I think it's important that we recognize this. We ought to be considering how we deal with cases of extreme poverty. We may want to create a future category. We may want to deal with that group of people, and that's a huge group, as Mr. Giuliani has said. It's a difficult problem, but I think that we confuse the issue and create problems when we try to define refugee and asylum other than in the way they are defined by law.

My second point is that the distinctions often do get blurred. Ira Kurzban raised the point this morning¹⁹ that often when you talk to somebody about a political or an economic refugee, you're talking in artificial terms. There is a continuum, and I think that most people come for a variety of reasons. They have political reasons; they have personal reasons; they have economic reasons. What we're trying to do is to create a system that is objective to the extent that it looks to see if the primary motivation to remain in this country is a well-founded fear of persecution. Those people who can prove this are the ones that we've decided arbitrarily, on the basis of this international standard, to protect and to accept into this country.

Audience Member: I'd like to direct this question to Professor Scanlan and Mr. Giuliani. Has the 1980 Refugee Act failed the test, and if so, why? How will the Simpson-Mazzoli bill pick up the pieces?

Professor Scanlan: There are a couple of parts to your question. Has the Refugee Act failed? In some respects, I think it has, but not in all. I, for instance, am not horribly distressed by the way that section 207 works. I think that it could work better if the allocation process were handled better. But I think there are some signs that the allocation process was more sophisticated this year than it ever was in the past. We assume that it probably will become more sophisticated in the future. In other respects, I think that it failed because it didn't go far enough in visualizing the possible effects of an entry pattern that included a large number of people seeking refuge in the United States as a country of first asylum. I mean, obviously, the Mariel boatlift²⁰ suggested that the

19. See 36 U. MIAMI L. REV. 865, 876-78 (1982).

20. Professor Scanlan refers to the 100,000-plus refugees who entered the United States from Cuba in 1980; Mariel was the port from which most of the refugees left Cuba.

Refugee Act did not cover that situation very well. To the extent that the Cuban and Haitian entrants either filed political asylum claims or were processed as if they were going to file political asylum claims, it was clear that the Act was rather unwieldy. I'm not sure how many of the entrants actually filed claims, but let's say anywhere from sixty to one hundred thousand people. I think it would probably be closer to sixty thousand. That problem, unfortunately, has continued. As of last count there were, I think, about 106,000 pending asylum claims.

I personally believe that the Simpson-Mazzoli bill does a number of things that will help the situation. For many of the reasons that we talked about earlier, I'm not sure that it does everything needed to alleviate the situation. I think, for instance, that entrusting the initial determination to administrative law judges will help. The independent review board proposed in the Simpson-Mazzoli bill will help. You still have a problem with clogging up the system with claims that are very similar on their face but which are nonetheless painstakingly individually examined, learning nothing from the similarities of other cases. This is one reason why I have advocated, for quite a while, that there be an asylum advisory board, which would have the capability of producing group profiles. These profiles would be used when it is clear that all members of a particular group do in fact have at least a *prima facie* case for asylum. (The Bahais in Iran are a very good example.) The government would not be precluded from coming back and saying, "Yes, that person is a Bahai, but he's also the brother of the prime minister, and he is not going to be persecuted, or he's a human rights violator himself and is not protected by the Act." The Simpson-Mazzoli bill is a big improvement on the Refugee Act.

Mr. Giuliani: The 1980 Act removed, as Mr. Posner indicated, the presumption of persecution for those fleeing communist countries, so that the question of refugee or asylum status has to be determined objectively, on a case-by-case basis and on the merits, whether you came from a communist country or not.

This is a very big change, and these determinations are going to be a very difficult thing for government officials to make; it's going to take a while to see how it all works out. They are very difficult because you're asking an official of the United States government to evaluate on an equal basis a claim for asylum from a government that is an enemy of the United States with one that is not, or, in fact, might be an ally (even though you might disagree with the policies of that government). It's an interesting policy de-

cision, that you should allocate places within the United States equally among your friends and enemies. This is the law, and it resulted in a dispute between the Justice Department and the State Department eight or nine months ago, over Indo-China, which you described before. I'm sure there are going to be other situations like that because the decisionmaking process goes against the grain, particularly for those who are in the business of determining what the best interests of the United States are or should be. I agree that we must be cautious.

The ultimate authority to decide whether someone is granted asylum or refugee status rests by law with the Attorney General, although the initial decisionmaking authority is delegated to the Commissioner of the INS. But it would be totally unrealistic to say that the State Department should not play a major role in the input of information used in deciding whether someone should be granted either one of those two statuses. The State Department is, in fact, our institutional eyes and ears on the international scene; they're our institutional evaluators of conditions in foreign governments. Nonetheless, the Justice Department and the Attorney General ultimately decide who is granted asylum or refugee status. Obviously, any Attorney General must give heavy weight to the recommendations, studies and background information supplied by the State Department. Not to do so would result in the decisionmaking process being even more difficult.

It is too early to tell how well the 1980 Act is working. There is a conscientious effort within the INS to apply the Act the way it's written, to do what they are asked to do. We've said a lot of things about the Immigration and Naturalization Service which suggest that it doesn't function well, that it's not organized as well as it should be, and that it doesn't have the resources or the expertise that it should have. This administration has done much to increase the services's resources and expertise by putting more money and more people into INS. During the last two years of the previous administration, the INS did not even have a commissioner. Now there is a commissioner. Improvements are going to take a while, but there is a real commitment to make them. Although there are people who have reservations about the wisdom of the 1980 Act, we are committed to making the difficult decisions mandated by the Act on a case-by-case basis. It will create a certain tension between the Justice and the State Departments, but that's a healthy tension because the decisions, in the long run, will be better.

Audience Member: Mr. Orlow, you've indicated that our

immigration policy is discriminatory. Is a discriminatory policy per se offensive to everybody in the United States, or do you feel that, within certain criteria set forth by the program that you proposed, a discriminatory policy could function?

Mr. Orlow: What I said is that our policy was racially discriminatory until 1965. That was amended out.²¹ I believe our present aspiration is to have a policy that is neutral as to nationality and race and, to some degree, as to sex. Do I think that we could have a discriminatory policy that would serve the United States well? In one way, we have a very discriminatory policy in terms of enforcement. The rich get representation, and the poor get deported.

Audience Member: Should we have a lottery type of system, where everybody files once a year, and 150,000 or whatever the quota requirement is for that year, win legal entry?

Mr. Orlow: This sounds like a debate that we had in undergraduate school on rushing and getting people into fraternities: Get the first twelve guys through the door, and then close the door. I don't know whether what John Scanlan says is right: the numbers game is a "losery." I have to agree with Rudy Giuliani's premise, that until we do some statistical studies, we don't know what we've got. That makes it impossible to give you an answer that I'd be comfortable with.

Audience Member: So then you would be opposed to a lottery?

Mr. Orlow: Oh yes.

Audience Member: I hate to digress to this question, but all of the panelists seem to be very concerned with it. You indicated, Mr. Giuliani, that you thought it was too early to evaluate what was happening under the Refugee Act of 1980, but that you apparently thought the regime of the country from which a person was fleeing would be considered.

Although Congress took out the communist/noncommunist distinction and instead put in the "well-founded fear of persecution" language, we continue to have this situation where people coming from certain countries consistently get refugee status because they come from—let's go back to Mr. Posner's use of Jeane Kirkpatrick's term—a totalitarian rather than an authoritarian

21. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (amending Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163). See generally Scully, *Is the Door Open Again? A Survey of Our New Immigration Law*, 13 U.C.L.A. L. Rev. 227 (1966).

country. Can you comment on that?

Mr. Giuliani: What I was indicating was that it is an understandable phenomenon that a person who is an official of this government would have a temptation to decide one way if a refugee was from a country that was an enemy of the United States, as opposed to a refugee from a country that was not. I know what the law says; we try very hard to apply it, and we try very hard to teach the people at INS how to apply it. But there is a tension there that you just have to recognize. First, it was done another way for a long time. It's going to take a while for that to change. Second, it does go against the grain to say we should rule out and not consider whether the government from which someone is fleeing is a government that is an avowed enemy of this country, as opposed to one that is not. You are going to find tensions that develop as a result of that. That is natural, that is a phenomenon that has occurred already and that is likely to continue to occur in applying the decisionmaking process under the 1980 Act. If American officials didn't have that kind of tension, I would be troubled.

Audience Member: Professor Scanlan mentioned the Bahais before, and I have a question related to that for Professor Scanlan and for Mr. Posner: Clearly, the Bahais have a well-founded fear of persecution, the Zoroastrans have a well-founded fear of persecution, as do virtually all the Shi'ites of Iran, virtually everybody in Ethiopia, everybody in Uganda, as does everybody in Kampuchia. As a practical matter, what would happen if all of these people wanted to act on their rights to seek asylum in this country?

Mr. Posner: I guess the first answer to that is that I'm not sure that I would be willing to say that every one of those people you mentioned does have a well-founded fear of persecution. I believe in the system of a case-by-case determination, and my sense is that the presumption would be that anybody who's a Bahai in Iran certainly is subject to a good hard look, and ninety-five percent to ninety-nine percent are likely to be people who are going to have trouble if they go back. Nevertheless, we would have to be true to the system of evaluating on a case-by-case basis.

The practical answer to your question is that most of those people aren't coming. If they are coming, they're coming in small numbers, and they tend to come in at regular admissions borders. They are far enough away; they have other places to go. If they do decide to come here, it's a pretty long and difficult journey.

Your question raises another point: One of the problems we

have in all these cases is that the federal government doesn't always find it convenient to live with case-by-case review. It's difficult in these mass asylum situations. So what we have happening, and I think it is unfortunate, is statements made by people in the administration in high positions, that certain groups are not refugees—for example, the Haitians. Now, this administration has stated again and again—as have people in the last administration—that “there are no political refugees from Haiti. There is no repression in Haiti. Haiti is fine.” I don't think that is honest, and I don't think that's exactly true in every case. It may be true in ninety percent or sixty percent of the cases. We may differ about the numbers, but we've got to stick with a case-by-case evaluation. If we do that, I think the way to get the system away from this political world that it's operating in and these old conceptions about communists and noncommunists is simply to allow the system to operate as it does, on the case-by-case basis, and not to have policy come down from “Mount High” saying, “For this group of 6,000, nobody is going to get asylum, because there is no persecution in country X.”

Audience Member: I'd like to address this question to Professor Chiswick. It's been argued that the solution to the illegal immigration problem is not to be found in more vigorous enforcement of the immigration laws, but rather in assisting unendowed countries in eradicating poverty. Would you advocate substantially increased U.S. aid to Haiti, and if so, how can you ensure that the aid can reach the needy or go to the development of the Haitian economy?

Professor Chiswick: That's a very good question; I'm glad the issue of foreign aid came up. Actually, foreign aid can sometimes have the reverse effect, that of encouraging flight from a country. Take a country in which the people are very poor—so poor that they don't have the resources to leave. That's probably the case for most Haitians. With some minimal level of development, they now have some resources to finance leaving the country. Therefore, foreign aid may not be a solution to flight from a country and may in fact increase it. Some studies have shown that to be the case.

In general, it's not clear that foreign aid has been helpful to the recipient countries. Many of the countries have dissipated the resources through corruption. Others have used the resources for projects that are counterproductive. Many less-developed countries have used the foreign aid to construct capital-intensive industries,

whereas what's needed for development would be labor-intensive industries. Many of these countries have used the foreign aid to increase their political domination over the population, rather than for development. I'm not a great fan of the effects of foreign aid.

Professor Swan: I think we're coming to the end of the hour now. I'll take one more question.

Audience Member: It was mentioned earlier that one of the alternatives that the United States has to its immigration problems is the transfer of refugees to other countries. How realistic is it to think that these other countries will be receptive to such a policy, especially in light of Puerto Rico's response to the transfer of the Mariel refugees?

Mr. Posner: I'll give you one example, and it's not a major one: I think there is interest among several French-speaking governments, including Quebec and France, in taking some of the Haitians. I don't know how far that's gotten. I think they want to find people with relatives in those countries. But we must explore those possibilities. One of the ways we can use our diplomatic and economic influence with regard to Spanish-speaking entrants, is to try to get some of our Latin American allies to take some of the burden. There are big countries, not poor countries, in Latin America that are our friends, and they haven't been doing what they can. The same thing is true in Southeast Asia. I don't want to overstate or to be overly optimistic about that. I recognize that it is a real problem to find governments that are as willing as we've been to take large numbers of people. I think that's a truism. We need to truly internationalize the process. By that I mean, go into the U.N. and get the United Nations High Commissioner for Refugees involved institutionally, and try to create a system where we're not only asking people to take, but where we're willing to give, and where we're willing to take international advice and to treat it seriously. I think we've been willing to throw the problem out and to say, "Well, we've done our share, now you do yours." But we haven't been willing to bring in the UNHCR and use their more formal ways of trying to resolve some of these problems. Ultimately, we must do that.

Professor Scanlan: Just a couple of points. First, I really don't think that the Puerto Rican situation is a terribly good analogy, simply because the Puerto Ricans to some extent regarded—and quite rightly so—the mainland as taking advantage of the colonial status of the island in attempting to dispose of a politically embarrassing problem here, which is not at all analogous to

what happens in our dealings with other countries. Nonetheless, I think that the trends generally are not very propitious in terms of expecting that there will be a great deal of additional support forthcoming from other countries, although I agree with Mr. Posner that that's a goal we very definitely must pursue.

When the Cubans came from the Peruvian embassy in 1980, for example, only about half of the original 10,000 received firm commitments for acceptance from other countries in the world. On the other hand, in the situation of the Vietnamese "boat people," the international commitment was much, much larger. I don't think you can generalize. I think it depends a little bit on what group you're talking about and on how it attracts the world's attention. But I'm not very hopeful about it.

Professor Chiswick: Even though I was the one who raised that question earlier today, I do recognize that there is a problem in convincing other countries to accept refugees. Japan is a good example. Japan took in fewer than a hundred Vietnamese "boat people" and claimed that taking in any more would destabilize their homogeneous population of 100 million, which must mean that either these Vietnamese are far more powerful than anybody had envisioned [laughter] or that the Japanese culture is extremely fragile. Although there has been a lot of criticism of American policy regarding refugees and suggestion that it's racist—some countries are far more so. Actually, most countries are *far* more racist than we are in their immigration policies.

Professor Swan: I want to thank everybody for coming, and I do want to thank the panel.